

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES EDWARD SCOTT,

Plaintiff,

v.

NAPHCARE, CLARK COUNTY
DETENTION CENTER, DOCTOR
KAREN, DOCTOR FEELEY, DOCTOR
WILLIAMSON,

Defendants.

Case No. 3:19-cv-00347-ART-CSD

ORDER

Before the Court are a Motion for Partial Reconsideration (ECF No. 116) and Motion to Strike (ECF No. 120) brought by Defendant Larry Williamson M.D. (“Dr. Williamson”), and a Motion to Respond to Defendants Reply to Plaintiff’s Opposition to ECF No. 115 (ECF No. 119) filed by Plaintiff James Edward Scott (“Scott”).

Dr. Williamson brings his Motion for Partial Reconsideration (ECF No. 116) on the grounds that the Court’s Order Regarding Report and Recommendations ECF Nos. 112, 113, and 114 (ECF No. 115) did not address one of Dr. Williamson’s arguments for summary judgment: that Scott failed to exhaust his administrative remedies before filing suit as required by the Prisoner Litigation Reform Act (PLRA). (ECF No. 116 at 1). For the reasons discussed below, this Court denies Dr. Williamson’s Motion for Reconsideration and Motion to Strike, and grants Scott’s Motion to Respond, which the Court construes as a Motion for Leave to File a Surreply.

I. BACKGROUND

The Court incorporates by reference its discussion of the factual background in this case in ECF No. 115 and Judge Denney’s factual background in ECF No. 112.

1 **II. LEGAL STANDARD**

2 **A. Motion for Reconsideration**

3 A motion for reconsideration may be brought according to either Federal Rule
 4 of Civil Procedure 59(e) or 60(b). *Taylor v. Knapp*, 871 F.2d 803, 805 (9th Cir.
 5 1989) (citing *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985)).

6 “*A district court may grant a Rule 59(e) motion if it ‘is presented with newly*
 7 *discovered evidence, committed clear error, or if there is an intervening change in*
 8 *the controlling law.’*” *Wood v. Ryan*, 759 F.3d 1117, 1121 (9th Cir. 2014)
 9 (emphasis in original) (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th
 10 Cir. 1999) (en banc)). “[A] Rule 59(e) motion is an ‘extraordinary remedy, to be
 11 used sparingly in the interests of finality and conservation of judicial resources.’”
 12 *Id.* (quoting *Kona Enters., Inc. v. Est. of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)).
 13 A Rule 59(e) motion must be filed no more than 28 days after the entry of the
 14 judgment. Fed.R.Civ.P 59(e).

15 “Rule 60(b) ‘allows a party to seek relief from a final judgment, and request
 16 reopening of his case, under a limited set of circumstances.’” *Wood*, 759 F.3d at
 17 1119 (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005)). “Under Rule
 18 60(b)(1), a party may seek relief based on ‘mistake, inadvertence, surprise, or
 19 excusable neglect.’” *Kemp v. United States*, — U.S. —, 142 S. Ct. 1856, 1861
 20 (2022). Rule 60(b)(1) “covers all mistakes of law made by a judge. . . .” *Id.* Under
 21 Rule 60(b)(6) a court may relieve a party or its legal representative from an order
 22 for “any ... reason that justifies relief” other than the more specific reasons set
 23 forth in Rule 60(b)(1)-(5). Fed.R.Civ.P. (60)(b)(6). A movant seeking relief under
 24 Rule 60(b)(6) must show “‘extraordinary circumstances’ justifying the reopening
 25 of a final judgment.” *Gonzalez*, 545 U.S. at 535 (quoting *Ackermann v. United*
 26 *States*, 340 U.S. 193, 199 (1950)). Unlike a Rule 59(e) motion, a Rule 60(b)(1)
 27 motion may be brought within one year, and a Rule 60(b)(6) motion need only be
 28 brought in a “reasonable time.” *Kemp*, 142 S. Ct. at 1861.

1 Here, Dr. Williamson brought his Motion for Partial Reconsideration (ECF No.
 2 116) six days after the Court entered its Order (ECF No. 115). Therefore, Dr.
 3 Williamson's Motion was timely under either Rule 59(e) or 60(b)(1). As no
 4 extraordinary circumstances exist in this case, the Court construes Dr.
 5 Williamson's Motion as arising under Rule 60(b)(1) based on the Court's omission
 6 of a discussion regarding administrative exhaustion.

7 **B. Administrative Exhaustion**

8 The PLRA provides that “[n]o action shall be brought with respect to prison
 9 conditions under section 1983 of this title, or any other Federal law, by a prisoner
 10 confined in any jail, prison, or other correctional facility until such administrative
 11 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).

12 “[T]he PLRA exhaustion requirement requires proper exhaustion.” *Woodford v.*
 13 *Ngo*, 548 U.S. 81, 93 (2006). [A] prisoner must complete the administrative review
 14 process in accordance with the applicable procedural rules, including deadlines,
 15 as a precondition to bringing suit in federal court[.]” *Id.* at 88. But, because the
 16 PLRA requires exhaustion of those administrative remedies “as are available,” the
 17 PLRA does not require exhaustion when circumstances render administrative
 18 remedies “effectively unavailable.” See *Sapp v. Kimbrell*, 623 F.3d 813, 822-23
 19 (9th Cir. 2010). In other words, an inmate must exhaust only those grievance
 20 procedures “that are ‘capable of use’ to obtain ‘some relief for the action
 21 complained of.” *Ross v. Blake*, 578 U.S. 632, 642 (2016) (quoting *Booth v.*
 22 *Churner*, 532 U.S. 731, 738 (2001)).

23 In a non-exhaustive list, the Supreme Court has explained three ways where
 24 a grievance procedure is unavailable: 1) when it operates as a “simple dead end—
 25 with officers unable or consistently unwilling to provide any relief to aggrieved
 26 inmates”; 2) when the administrative scheme is “so opaque that it becomes,
 27 practically speaking, incapable of use”; and 3) when “prison administrators
 28 thwart inmates from taking advantage of a grievance process through

1 machination, misrepresentation, or intimidation.” *Id.* In the third instance, a
 2 grievance procedure is unavailable when “the correctional facility’s staff misled
 3 the inmate as to the existence or rules of the grievance process,” misled the
 4 inmate “into thinking that … he had done all he needed to initiate the grievance
 5 process” or “play[s] hide-and-seek with administrative remedies.” *Id.* at fn.3
 6 (citations omitted). As is relevant here, “remedies are not considered ‘available’ if,
 7 for example, *prison officials do not provide the required forms to the prisoner* or if
 8 officials threaten retaliation for filing a grievance.” *Draper v. Rosario*, 836 F.3d
 9 1072, 1078 (9th Cir. 2016) (emphasis added).

10 Failure to exhaust administrative remedies is a non-jurisdictional affirmative
 11 defense that defendants must raise and prove. *See Albino v. Baca*, 747 F.3d 1162,
 12 1166 (9th Cir. 2014); *Jones v. Bock*, 549 U.S. 199, 212-17 (2007). A “defendant
 13 must first prove that there was an available administrative remedy and that the
 14 prisoner did not exhaust that available remedy. … Then, the burden shifts to the
 15 plaintiff, who must show that there is something particular in his case that made
 16 the existing and generally available administrative remedies effectively
 17 unavailable to him by showing that the local remedies were ineffective,
 18 unobtainable, unduly prolonged, inadequate, or obviously futile. … The ultimate
 19 burden of proof, however, remains with the defendants.” *Williams v. Paramo*, 775
 20 F.3d 1182, 1191 (9th Cir. 2015). “If undisputed evidence viewed in the light most
 21 favorable to the prisoner shows a failure to exhaust, a defendant is entitled to
 22 summary judgment under Rule 56. If material facts are disputed, summary
 23 judgment should be denied, and the district judge rather than a jury should
 24 determine the facts [in a preliminary proceeding].” *Albino*, 747 F.3d at 1166.

25 **III. DISCUSSION**

26 Dr. Williamson is correct that the Court did not discuss one of Dr.
 27 Williamson’s grounds for summary judgment—administrative exhaustion—in its
 28 Order. (ECF No. 115). The Court does so here.

1 **A. Administrative Exhaustion**

2 Here, Dr. Williamson has proffered evidence that a NaphCare grievance policy
3 existed at all times relevant to this lawsuit and that the NaphCare grievance
4 policy included an appeals process that Scott did not utilize while he was
5 incarcerated at CCDC. (See ECF No. 85-2 at 1-2, 5).

6 Dr. Williamson has not, however, demonstrated that the NaphCare grievance
7 policy was available to Scott. Construing all evidence in Scott's favor, Scott has
8 proffered evidence that he was only aware of CCDC's grievance policy, not
9 NaphCare's policy. In addition, Scott has met his burden showing that the
10 NaphCare grievance process was effectively unavailable to him because prison
11 officials did not provide him with the proper forms, required him to sign an
12 acknowledgment of the NaphCare grievance policy he was allegedly never shown,
13 and effectively played "hide-and-seek with administrative remedies" regarding the
14 NaphCare grievance policy. See *Ross*, 578 U.S. at 643 fn.3; *Draper*, 836 F.3d at
15 1078. Therefore, given that Scott did put Dr. Williamson on notice of his concern
16 that Dr. Williamson's administration of lisinopril caused his kidney injury via the
17 CCDC grievance process, the Court concludes that Scott has met the
18 administrative exhaustion requirements under the PLRA.

19 At times, the briefing in this case conflates the two grievance policies
20 theoretically available to Scott while incarcerated at CCDC: the CCDC grievance
21 policy and the NaphCare grievance policy. As Dr. Williamson points out, "[t]he
22 administrative remedies pertaining to claims against Dr. Williamson are governed
23 by NaphCare's grievance policy . . . not the CCDC grievance policy." (ECF No. 118
24 at 2). As such, the operative question is whether Dr. Williamson has met his
25 burden of demonstrating that NaphCare's grievance process was generally
26 available, and, if so, whether Scott has shown that the generally available remedy
27 was effectively unavailable to him. See *Williams*, 775 F.3d at 1191; *Ross*, 578 U.S.
28 at 642.

1 Scott filed two grievances relating to his treatment by Dr. Williamson while
2 incarcerated at CCDC. (See ECF No. 85-2 at 12-13). Dr. Williamson argues that
3 the two grievances Scott filed against him were insufficient to exhaust Scott's
4 administrative remedies because Scott did not appeal the responses as
5 authorized by the NaphCare grievance policy. Scott emphatically argues that he
6 was never told about the NaphCare grievance policy, including its appeal
7 procedures. Scott alleges, “[a]ll that I knew was that there was a grievance form
8 that I can fill out (which I did).” (ECF No. 92 at 8) (emphasis added) (see also ECF
9 No. 119 at 3-4 (Scott was never aware of NaphCare grievance policy until after it
10 was produced during this litigation)). The sole grievance form Scott was aware of
11 is presumably the “Las Vegas Metropolitan Police Department Inmate
12 Request/Grievance” form discussed below, as Scott filed all the medical and non-
13 medical grievances presently in the record before the Court using this form.

14 Dr. Williamson submits no evidence that Scott was aware of the NaphCare
15 grievance policy specifically other than Scott's electronic signing of two forms: the
16 “General Informed Consent form” and the “Medical Services form.” (ECF No. 85-
17 2 at 8-9). Scott alleges, however, that he was never shown the General Informed
18 Consent or Medical Services forms. (ECF No. 117 at 5). Scott avers that he was
19 “simply told to sign a small black electronic keypad confirming that [Scott]
20 received an ‘orientational’ medical screening” and that he was unaware of the
21 forms to which his signature would be applied. (*Id.* at 5-6). The General Informed
22 Consent and Medical Services forms filed by Dr. Williamson show an electronic,
23 not wet, signature. (ECF No. 97-1 at 4-5). Dr. Williamson has submitted no
24 additional evidence that Scott was actually provided with the forms themselves,
25 rather than the electronic signature pad alone. (See ECF Nos. 85 at 17-18; 97 at
26 2-4; 116 at 3-4). Construing all evidence in Scott's favor as the Court must at
27 this stage of the proceedings, Scott's electronic signatures do not show his
28 knowing acknowledgement of the forms' contents absent additional evidence

1 indicating that copies of the General Informed Consent and Medical Services
2 forms were given or shown to Scott prior to him providing his electronic signature.

3 Moreover, Dr. Williamson submits no evidence that the NaphCare
4 Grievance Form outlined in the NaphCare grievance policy was ever provided to
5 Scott for him to appeal the CCDC grievances Scott filed against Dr. Williamson.
6 Both of Scott's grievances against Dr. Williamson were filed on forms titled "Las
7 Vegas Metropolitan Police Department Inmate Request/Grievance." (See ECF No.
8 85-2 at 12-13). This is the same form Scott used to file grievances for a wide
9 variety of issues at CCDC, including the return of property, issues with Scott's
10 commissary account, and the issues Scott has litigated in this action against
11 Officer Franklin. (See generally ECF No. 87-5). Notably, the NaphCare grievance
12 policy in effect at CCDC at all times relevant to this litigation called for the use of
13 a "Health Care Complaint form" at the first level of NaphCare's grievance process,
14 a "Health Care Grievance form" at the second level of NaphCare's grievance
15 process, and a "Health Care Grievance Appeal form" at the third level of
16 NaphCare's grievance process. (ECF No. 85-2 at 5-6). Based on the Court's
17 inspection of the record, none of these forms are before the Court, nor is there
18 any evidence that they were physically available at CCDC during the relevant
19 period.

20 The availability of the NaphCare grievance process is further obfuscated by
21 language in the CCDC Inmate Handbook, which discusses a medical grievance
22 policy but omits any discussion of an appeals process. (ECF No. 87-7 at 27).
23 Instead, the "Medical Request/Grievance Forms" section reads, in full, "[I]f you
24 are not satisfied with any aspect your health care, you have the right to request
25 information or send a grievance to the contracted medical provider, [sic] health
26 services administrator, for an investigation and response to your complaint." (*Id.*)
27 By comparison, the NaphCare grievance policy includes a detailed three-level
28 appeals process, including procedural and temporal limitations on that process.

1 (ECF No. 85-2 at 5-6). Insofar as these policies are contradictory, the rules were
2 so confusing that no reasonable prisoner could navigate them, and the
3 administrative remedies were therefore unavailable to Scott.

4 Viewing the evidence in the light most favorable to Scott, Scott met his
5 burden in showing that the NaphCare administrative remedy and its attendant
6 appeals process was not available to him. “To be available, a remedy must be
7 available ‘as a practical matter’; it must be ‘capable of use; at hand.’” *Williams*,
8 775 F.3d at 1191 (quoting *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014)).
9 Scott’s grievances regarding the care provided by Dr. Williamson provided him
10 and CCDC with opportunities to correct Dr. Williamson’s alleged error by putting
11 NaphCare on notice that Scott believed lisinopril had caused severe damage to
12 his kidneys. Construing all facts in the light most favorable to Scott, CCDC and
13 NaphCare both misled Scott into thinking that he had completed the grievance
14 process by including a fraction of it in the CCDC Inmate Handbook, and “play[ed]
15 hide and seek” with NaphCare administrative remedies by not providing the
16 proper NaphCare grievance forms to Scott and omitting the relevant appeals
17 information from the Inmate Handbook. *See Ross*, 578 U.S. at 643 fn.3.

18 For the reasons discussed above, the Court therefore denies Dr.
19 Williamson’s Motion for Reconsideration. (ECF No. 116).

20 **B. Motion for Surreply and Motion to Strike**

21 Scott filed a “Motion to Respond to Defendants’ Reply to Plaintiff’s Opposition
22 to ECF No. 115.” (ECF No. 119). In it, Scott requests the Court “grant [Scott]
23 permission to submit a response” to Dr. Williamson’s Reply. (ECF No. 118). In
24 response, Dr. Williamson filed a Motion to Strike. (ECF No. 120). Given his *pro se*
25 status, the Court construes Scott’s Motion to Respond as a request for leave of
26 court to file a surreply, and the memorandum of points and authorities therein
27 as the contents of the surreply. Good cause appearing, the Court grants Scott’s
28 Motion to Respond (ECF No. 119) and accordingly denies Dr. Williamson’s Motion

1 to Strike. (ECF No. 120).

2 **IV.CONCLUSION**

3 The Court notes that the parties made several arguments and cited to several
4 cases not discussed above. The Court has reviewed these arguments and cases
5 and determines that they do not warrant discussion as they do not affect the
6 outcome of the motion before the Court.

7 For the foregoing reasons, the Court hereby denies Dr. Williamson's Motion
8 for Reconsideration. (ECF No. 116).

9 It is further ordered that Scott's Motion to Respond is granted. (ECF No. 119).

10 It is further ordered that Dr. Williamson's Motion to Strike is denied. (ECF No.
11 120).

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13 It is so ordered.

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15 DATED THIS 13th day of June 2023.

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19 ANNE R. TRAUM
20 UNITED STATES DISTRICT JUDGE
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